

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Dublin Division

IN RE:)	Chapter 7 Case
)	Number <u>92-30243</u>
AJAY M. KOTHARI)	
)	
Debtor)	
_____)	
)	FILED
DIPTI KOTHARI)	at 4 O'clock & 15 min. P.M.
)	Date: 6-3-93
Plaintiff)	
)	
vs.)	Adversary Proceeding
)	Number <u>92-3024</u>
AJAY M. KOTHARI)	
)	
Defendant)	

ORDER

Plaintiff, Dipti Kothari, brought this adversary proceeding pursuant to 11 U.S.C. §523(a)(5). Plaintiff contends a lump sum award to her under a divorce decree, Fifty-Eight Thousand Eight Hundred Twelve and No/100 (\$58,812.00) Dollars, against the defendant, her former husband Ajay M. Kothari, is a nondischargeable debt. Defendant counterclaims for attorney's fees. Based on the evidence presented at trial and relevant legal authority I make the following findings.

FINDINGS OF FACT

The parties married in India on April 30, 1981. Later that year they moved to the United States. Beginning in September 1981, plaintiff worked full-time to provide the couple's primary support while defendant, who held a license to practice medicine in India, studied to take required medical exams for his license to practice medicine in the United States. In July 1983 defendant passed the licensing exams and began working on a full-time basis toward the completion of his residency requirements, providing the primary support for the couple. On May 27, 1985 the couple had their first and only child. In 1987, at a time when the family resided in Chicago, Illinois, defendant obtained employment as a physician in Fairfield, Ohio. Defendant relocated to Fairfield; however, plaintiff and the child remained in Chicago. The parties separated on August 10, 1987.

Following the separation, defendant did not provide any support to plaintiff or his child for a period of approximately two years. It is undisputed that defendant provided financial support to his parents at times during his marriage to plaintiff, both by sending them money and in permitting them to live with him, including the period of time following the parties' separation when defendant provided no support to plaintiff and the child. Defendant testified that he made cash payments to his parents for the purpose

of repaying them for his education. Shortly after the separation, defendant moved to India, without informing plaintiff. Plaintiff did not learn of defendant's whereabouts until March 1989, when she located him in Dublin, Georgia.

On August 7, 1989 plaintiff filed a complaint for divorce in the Superior Court of New Jersey Chancery Division, Family Part, Mercer, County. On July 12, 1990 the Superior Court judge concluded a bench trial of the case. The transcript of the trial (TR) (defendant's exh. No. 1) shows that the Superior Court judge determined that defendant paid his parents a total of Thirty Thousand and No/100 (\$30,000.00) Dollars cash and spent another Fifty-Eight Thousand Six Hundred Twenty-Four and No/100 (\$58,624.00) Dollars supporting his parents. (See TR at 17-20, 32-37). The judge further determined that these sums of money constituted "marital funds" "secreted" to defendant's parents. Additionally, the judge determined that defendant spent Nineteen Thousand and No/100 (\$19,000.00) Dollars from "marital funds" in connection with his move to India and return to the United States. Id. The judge awarded plaintiff half of these sums of money, referring to the award as an "equitable distribution" of "marital funds." (E.g., TR at 20). The judge also determined that defendant owed plaintiff "reimbursement alimony" of Five Thousand and No/100 (\$5,000.00) Dollars for her financial and emotional support of him during

September 1981-July 1983 while defendant studied for his licensing exams. (TR at 21-22). Having determined the "equitable distribution," the judge stated in court, "[t]urning to the issues of child support and alimony . . . ," TR at 22, then proceeded to meticulously examine the individual financial circumstances and needs of the parties at the time of the divorce. The judge awarded plaintiff alimony payments of One Hundred Twenty-Five and No/100 (\$125.00) Dollars a week and child support payments of Two Hundred Twenty-Five and No/100 (\$225.00) Dollars a week.

By order dated July 12, 1990 the Superior Court judge entered a final judgment for divorce (the divorce decree), which provides in relevant part:

IT IS, on this 12th day of July, 1990, ORDERED and ADJUDGED that, pursuant to the Statute in such case made and provided, the marriage between the parties is dissolved; and IT IS FURTHER ORDERED that:

EQUITABLE DISTRIBUTION

1. The Court finds that the defendant paid over to his parents the reasonable sum of \$30,000.00 which amount was marital funds subject to equitable distribution. The plaintiff is entitled to one half of that amount or the sum of \$15,000.00.

2. The Court finds that the defendant admittedly spent the sum of \$58,624.00 to support his parents, which amount was marital funds subject to equitable distribution. The plaintiff is entitled to one half of that amount or the sum of \$29,312.00.

3. The Court finds that the defendant had a marital fund of \$19,000.00 which included proceeds from various bank accounts, sale of

furnishings and sale of the automobile which was subject to a loan he paid off from marital funds and then sold. The plaintiff is entitled to one half of that amount or the sum of \$9,500.00.

4. The Court finds that the plaintiff from September 1981 to July 1983 at times was the sole support of the parties; that she provided the funds for payments of defendant's medical courses and his trips needed by defendant to be licensed to practice medicine in the United States; that in addition she typed numerous applications and letters for defendant as well and provided him with emotional support. Accordingly, plaintiff is entitled to reimbursement alimony in the amount of \$5000.00.

5. The above sums to which plaintiff is entitled total \$58,812.00 (including paragraph 1, \$15,000.00; paragraph 2, \$29,312.00 paragraph 3, \$9500.00; paragraph 4, \$5000.00). This amount of \$58,812.00 is hereby entered as a Judgment against defendant.

6. The plaintiff shall retain as her sole property the Roma Savings Bank account in her name.

7. The defendant shall retain as his sole property the Dublin Bank account in his name.

8. Each party shall retain the IRA account in their respective names as their sole property respectively.

ALIMONY

9. The defendant shall pay alimony to the plaintiff in the sum of \$125.00 per week. Said payment shall continue until the remarriage of the plaintiff or the death of either party. Said payment shall be due on July 12, 1990, and weekly thereafter.

10. Any arrearage in alimony under the Order of February 14, 1990, shall not abate.

CHILD CUSTODY, SUPPORT AND VISITATION

11. The plaintiff shall have sole custody of

Madhuri Kothari, born May 27, 1985.

12. The defendant shall pay the sum of \$225.00 per week to the plaintiff as child support for Madhuri Kothari. Said payment shall be due on July 12, 1990 and weekly thereafter.

13. Any arrearage in child support under the Order of February 14, 1990, shall not abate.

14. The defendant shall forthwith change the beneficiary of all his life insurance policies through his employer or elsewhere to "Dipti Kothari in trust for Madhuri Kothari" and shall provide plaintiff through her attorney of proof of the change. In the event of any change of employment the requirement that defendant shall continue the life insurance in full force and effect.

In the event a similar amount of life insurance is not provided by any future employer, the defendant shall provide life insurance in an amount commensurate with his current life insurance. This requirement of life insurance coverage for the benefit of the child of the parties shall continue in effect until the child is graduated from college. Proof of defendant's life insurance shall be provided to plaintiff by defendant on an annual basis.

15. The defendant shall continue to provide full medical coverage for the child of the marriage and the defendant shall be responsible for one hundred percent of all un-reimbursed medical expenses of every kind, however the defendant shall have a right to consultation for any expenses over \$200.00 and the opportunity for a second opinion at his expense unless the medical services is [sic] required on an emergent basis.

16. The defendant shall be responsible for two-thirds of all college expenses of the child. The plaintiff shall be responsible for one-third of all the college expenses of the child.

17. Having concern for the best interests of the child the defendant shall be entitled to visitation of no more than three hours at a

time for one weekend a month. The visitation must be in New Jersey and can be on both Saturday and Sunday. All visitation must be supervised by a third party acceptable to both plaintiff and defendant.

18. Because of concern for the child's psychological well being, the visitation specified above shall continue for a period of six months. As the visitation can take place only in New Jersey under supervised conditions, no bond is necessary nor is a psychological evaluation needed at this time. At the end of the six month period the Court will re-evaluate whether any changes should be made as to the visitations.

PAYMENT OF PLAINTIFF'S COUNSEL FEES

19. The defendant shall pay the firm of Meredith, Meredith & Chase, Esquires, attorneys for the plaintiff, the sum of \$6,000.00 towards plaintiff's counsel fees and costs, the firm having submitted an Affidavit of Services.

DEFENDANT'S PAYMENT OF AMOUNTS DUE FOR EQUITABLE DISTRIBUTION
ALIMONY, CHILD SUPPORT AND PLAINTIFF'S
COUNSEL FEES AND COSTS

20. As the defendant presently resides in Dublin, Georgia, the Order of February 14, 1990 has been paid by him under U.R.E.S.A. to the Office of Child Support Recovery, Post Office Box 488, Dublin, Georgia 31021, which agency then forwards defendant's payments to the Mercer County Probation Office Child Support Enforcement Unit, 612 South Broad Street, Trenton, New Jersey 08650. This method of payment shall continue and shall include all payment due from defendant to plaintiff, including equitable distribution, alimony, child support, medical payments and counsel fees, and may be enforced by an income withholding upon the commissions, earnings, salaries, wages and other current or future income of the defendant as provided by law, and if applicable under applicable law.

Defendant appealed the divorce decree. The appellate court remanded the case to the trial court to reconsider the award of alimony and child support, but in all other respects affirmed the divorce decree. Kothari v. Kothari, A-456-90T3 (Superior Ct. of New Jersey App. Div., Apr. 15, 1992). On remand, the trial court modified paragraphs 9 and 12 of the divorce decree, reducing the alimony payments to Ninety-Five and No/100 (\$95.00) Dollars a week and the child support payments to Two Hundred and No/100 (\$200.00) Dollars a week. At the time of the divorce, defendant earned an annual salary of Seventy-Eight Thousand and No/100 (\$78,000.00) Dollars. Plaintiff earned an annual salary of Thirty-Three Thousand Five Hundred and No/100 (\$33,500.00) Dollars.

Plaintiff seeks a determination that defendant's lump-sum obligation to pay her Fifty-Eight Thousand Three Hundred Twelve and No/100 (\$58,312.00) Dollars under paragraphs No. 1-8 of the divorce decree is a nondischargeable debt. No other obligations of defendant under the divorce decree are at issue in this adversary proceeding. Defendant maintains that the subject award constitutes a division of property and counterclaims for attorney's fees, alleging plaintiff's complaint is frivolous.

CONCLUSIONS OF LAW

Section 523(a)(5) excepts from discharge

any debt--

. . .

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that--

. . .

(B) such debt includes a liability designated as alimony, maintenance, or support unless such liability is actually in the nature of alimony, maintenance, or support[.]

Section 523(a)(5) "suggests a simple inquiry as to whether the obligation can legitimately be characterized as support, that is, whether it is in the nature of support." In re: Harrell, 754 F.2d 902, 906 (11th Cir. 1985). If the obligation is in the nature of a property settlement, it is dischargeable. Id. at 906-07. The substance and function of the obligation determine whether it is "alimony," "maintenance," or "support" as meant in §523(a)(5). "The initial inquiry must be to ascertain whether the State Court or the parties to the divorce intended to create an obligation to provide support; if they did not, the inquiry ends there." In re: Bedingfield, 42 B.R. 641, 646 (S.D. Ga. 1983).¹ The bankruptcy

¹Bedingfield was overruled by the Eleventh Circuit in Harrell, supra, to the extent the court in Bedingfield held that "the

court should "consider any relevant evidence including those facts utilized by state courts to make a factual determination of intent to create support." Long v. Calhoun, 715 Fd.2d 1103, 1109 (6th Cir. 1983). The following factors have been used by other courts as guidelines in determining whether a debt is in the nature of support:

- 1) The amount of alimony, if any, awarded by the State court and the adequacy of such award;
- 2) The need for support and the relative income of the parties at the time the divorce decree was entered;
- 3) The number and age of children;
- 4) The length of the marriage;
- 5) Whether the obligation terminates on death or remarriage of the former spouse;
- 6) Whether the obligation is payable over a long period of time;
- 7) The age, health, education, and work experience of both parties;
- 8) Whether the payments are intended as economic security or retirement benefits;
- 9) The standard of living established during the marriage.

Suarez v. Suarez (In re: Suarez), Ch. 11 case No. 91-20276 Adv. No.

bankruptcy courts may examine the debtor's ability to pay . . . at the time of the bankruptcy proceeding." Bedingfield, supra, at 646. In all other respects, Bedingfield is binding authority in this district.

92-2009 slip op. at 23-24 (Bankr. S.D. Ga. Davis, C.J. Dec. 23, 1992). The party objecting to discharge bears the burden of proof that the debt in question is excepted from discharge, Federal Rule of Bankruptcy Procedure 4005, which must be shown by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.E.2d 755 (1991).

The lump sum award of Fifty-Eight Thousand Eight Hundred Twelve and No/100 (\$58,812.00) Dollars was not intended by the Superior Court judge to provide support, but was intended to effect a property division. Having carefully and thoroughly reviewed plaintiff's and defendant's individual financial circumstances at the time of the divorce, including their relative incomes and living expenses, and having considered the present and future needs of the child, the Superior Court judge awarded specific alimony and child support payments to plaintiff. (TR at 24-28). The intended alimony and child support awards did not include the lump-sum award of Fifty Eight Thousand Eight Hundred Twelve and No/100 (\$58,812.00) Dollars, which was awarded in a separately section of the divorce decree. Regarding the Fifty-Eight Thousand Eight Hundred Twelve and No/100 (\$58,812.00) Dollar award, the Superior Court judge was unequivocal in her remarks during the divorce proceeding, and in the divorce decree itself, of her intent to effect a division of marital property that would have been available at the time of the divorce

but for defendant's dissipation of marital funds, and to compensate plaintiff, with "reimbursement alimony," for her prior support of defendant. To accomplish these specifically articulated objectives the judge awarded plaintiff 1) Fifteen Thousand and No/100 (\$15,000) Dollars as half of Thirty Thousand and No/100 (\$30,000.00) Dollars defendant paid his parents; 2) Twenty-Nine Thousand Three Hundred Twelve and No/100 (\$29,312.00) Dollars as half of Fifty-Eight Thousand Six Hundred Twenty-Four (\$58,624.00) Dollars defendant spent in supporting his parents; 3) Nine Thousand Five Hundred and No/100 (\$9,500.00) Dollars as half of a marital fund of Nineteen Thousand and No/100 (\$19,000.00) Dollars; and 4) Five Thousand and No/100 (\$5,000.00) Dollars as "reimbursement alimony."

Plaintiff argues that the Fifty-Eight Thousand Eight Hundred Twelve and No/100 (\$58,812.00) Dollars award represents money that "should have been used to support [plaintiff] during the two (2) year period [following the parties' separation] in which she and her minor child received no support [from defendant]." Plaintiff's brief, p. 5. However, the extent to which defendant failed to support plaintiff and the child during the course of the marriage is irrelevant for purposes of 11 U.S.C. §523(a)(5). Section 523(a)(5) excepts from discharge only debts in the nature of support, In re: Harrell, supra, which requires an assessment of the facts and circumstances of the case as of the time of the divorce to

determine whether the state court judge or jury, or the parties, intended the subject obligation to provide support. See id. at 906. The Superior Court judge was very clear that she believed defendant "secreted" money to his parents, money that would otherwise have been available for a property division. To effect the would-be division of property the judge imposed a lump sum debt obligation equal to plaintiff's share of the secreted marital property. The debt, therefore, is not in the nature of support. Concerning that portion of the Fifty-Eight Thousand Eight Hundred Twelve and No/100 (\$58,812.00) Dollars award labeled "reimbursement alimony," by the express terms of the divorce decree this obligation was intended to reimburse plaintiff for her financial support of the couple while defendant studied for his medical exams, but not to provide support. Therefore, the "reimbursement alimony" is not excepted from discharge pursuant to §523(a)(5). 11 U.S.C. §523(a)(5)(B); See generally Pierce v. Sasser (In re: Pierce), Ch. 7 case No. 91-60565 Adv. No. 91-6038 (Bankr. S.D. Ga. Dalis, J. Feb. 12, 1993).

As to defendant's counterclaim, I find his allegations are without merit. Although finding against the plaintiff on her complaint, the cause of action alleged was not frivolous under the evidence presented.

It is therefore ORDERED that judgment is entered in favor of defendant on plaintiff's complaint;

further ORDERED that the lump obligation of Fifty-Eight Thousand Eight Hundred Twelve and No/100 (\$58,812.00) Dollars awarded plaintiff under the subject divorce decree is not a nondischargeable debt under 11 U.S.C. §523(a)(5);

further ORDERED that judgment is entered in favor of plaintiff on defendant's counterclaim.

No monetary damages are awarded.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 3rd day of June, 1993.